1988

Albert John v. David Okubo : Brief of Appellee

Utah Court of Appeals

David L. Grindstaff; attorney for appellants.
R. Scott Williams, G. Eric Nielson; Strong and Hanni; Gary D. Stott, Michael A. Peterson; Richards, Brandt, Miller .

IN THE SUPREME COURT OF UTAH

ALBERT JOHN and ANGELA BUTTERFIELD, as guardian and parents of and on behalf of TIFFANY RUTH BUTTERFIELD, Plaintiffs/Appellants, vs. DAVID OKUBO, THOMAS NICKOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5, Defendants/Appellees.	DC C86-9250 CA 880347-CA SC 900272 Priority No. 13

APPELLEE NICKOL'S BRIEF

Appeal From a Decision of the Utah Court of Appeals
Affirming Summary Judgment Dismissal
of Appellants' Complaint

David L. Grindstaff
395 South 600 East
Salt Lake City, Utah 84102
(801) 363-1370
Attorney for Plaintiffs/
Appellants

Gary D. Stott
Michael A. Peterson
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, #700
Salt Lake City, Utah 84114
Attorneys for Appellee Nickol

R. Scott Williams
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Appellee Okubo

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145
Attorneys for Appellee Holy Cross

IN THE SUPREME COURT OF UTAH

ALBERT JOHN and ANGELA BUTTERFIELD, as guardian and parents of and on behalf of TIFFANY RUTH BUTTERFIELD, Plaintiffs/Appellants, vs. DAVID OKUBO, THOMAS NICKOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5, Defendants/Appellees.	DC C86-9250 CA 880347-CA SC 900272 Priority No. 13

APPELLEE NICKOL'S BRIEF

Appeal From a Decision of the Utah Court of Appeals
Affirming Summary Judgment Dismissal
of Appellants' Complaint

David L. Grindstaff
395 South 600 East
Salt Lake City, Utah 84102
(801) 363-1370
Attorney for Plaintiffs/
Appellants

Gary D. Stott
Michael A. Peterson
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, #700
Salt Lake City, Utah 84114
Attorneys for Appellee Nickol

R. Scott Williams
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Appellee Okubo

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145
Attorneys for Appellee Holy Cross

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE SUPREME COURT OF UTAH

ALBERT JOHN and ANGELA BUTTERFIELD, as guardian and parents of and on behalf of TIFFANY RUTH BUTTERFIELD, Plaintiffs/Appellants, vs. DAVID OKUBO, THOMAS NICKOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5, Defendants/Appellees.	DC C86-9250 CA 880347-CA SC 900272 Priority No. 13

APPELLEE NICKOL'S BRIEF

Appeal From a Decision of the Utah Court of Appeals
Affirming Summary Judgment Dismissal
of Appellants' Complaint

JURISDICTION OF THE COURT AND NATURE OF THE PROCEEDINGS

The Utah Supreme Court has jurisdiction, pursuant to Utah Code Ann. §78-2-2(3)(a) and §78-2-2(5), to review the Court of Appeals' decision filed in this matter on March 28, 1990.

ISSUE PRESENTED ON APPEAL

Whether the Court of Appeals properly affirmed the District Court's Order of Dismissal on the basis that the plaintiffs failed to establish a prima facie case linking Dr.

Nickol's conduct to the proximate cause of Tiffany Butterfield's death.

CONTROLLING PROVISIONS

Rule 56(e) of the Utah Rules of Civil Procedure may govern the Court's analysis of this case. This rule reads, in pertinent part, as follows:

> When a motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (Emphasis added.)

STATEMENT OF THE CASE

A. Nature of the Action.

The above-captioned lawsuit is a wrongful death malpractice action against Thomas E. Nickol, M.D. (hereinafter "Dr. Nickol") and other named defendants. Appellants Albert John and Angela Butterfield (hereinafter "the Butterfields") filed their Complaint against Dr. Nickol on September 19, 1986. (Record on Appeal "R." at pp. 2-5.) More than a year after the Complaint was filed, Dr. Nickol filed a Motion for Summary Judgment dismissal of the Complaint on the grounds that the Butterfields had failed to produce the requisite medical expert testimony necessary to

prove their medical malpractice claims at trial. (R. 131-132, 145-168.) Appellees Dr. David Okubo and Holy Cross Jordan Valley Hospital also filed Motions for Summary Judgment. (R. 66-67, 73-103.) After hearing oral argument on December 23, 1987, Judge Richard H. Moffat ruled in favor of appellees' Motions. (See, Order and Summary Judgment attached hereto as Addendum "A".) The Butterfields appealed the trial court's order granting summary judgment, and the Court of Appeals affirmed the lower court's decision on March 28, 1990. (See, Opinion of the Utah Court of Appeals attached hereto as Addendum "B".)

B. Statement of the Facts.

This is a medical malpractice case based upon the alleged failure of Dr. Nickol, an emergency room physician, and others to diagnose and treat breathing problems which allegedly caused appellants' minor child, Tiffany Ruth Butterfield, to die of sudden infant death syndrome (SIDS).

Tiffany was born to Albert John and Angela Butterfield on June 30, 1984 at Holy Cross Jordan Valley Hospital. (R. at p. 2.) On July 4, 1984, three days after Tiffany was discharged from the hospital, the Butterfields brought Tiffany to the emergency room at Holy Cross Jordan Valley Hospital. Dr. Nickol was the emergency room physician

on duty that evening. Mrs. Butterfield told Dr. Nickol that Tiffany seemed congested and was having some trouble breathing. (Dr. Nickol's Deposition pp. 18-19 attached hereto as Addendum "C", and Mrs. Butterfield's Deposition, p. 26 attached hereto as Addendum "D".)

After reassuring himself that Tiffany's condition did not demand immediate medical attention, Dr. Nickol consulted with Tiffany's pediatrician, Dr. Okubo, to ask whether he would like to come into the emergency room and examine Tiffany or whether he would prefer that Dr. Nickol do the examination. (Dr. Nickol's Deposition, pp. 26, 41-44.) Dr. Okubo approved Dr. Nickol's examination of Tiffany over the telephone. (Dr. Nickol's Deposition, p. 26.)

After completing his discussion with Dr. Okubo and his examination of Tiffany, Dr. Nickol indicated to Mr. and Mrs. Butterfield that Tiffany needed no treatment that evening for her congestion, and that the Butterfields should take Tiffany to see Dr. Okubo the next morning for a follow-up examination. (Dr. Nickol's Deposition, p. 26.) The Butterfields did not take Tiffany to Dr. Okubo the next day for the recommended follow-up exam. (See, the uncontested facts in Dr. Okubo's Summary Judgment memorandum and the medical records attached as Addendum "E".) On August 16, 1984, at approximately 8:00 p.m., Mr. and

Mrs. Butterfield again took Tiffany to the emergency room at Holy Cross Jordan Valley Hospital. (Mrs. Butterfield's Deposition at pp. 40-41, 46.) Dr. Nickol was again on duty as the emergency room physician. (Dr. Nickol's Deposition, p. 27.) The emergency room hospital records from Holy Cross Jordan Valley Hospital for the evening of August 16, 1984, indicate that Mrs. Butterfield told Dr. Nickol that Tiffany had been experiencing breathlessness and irregular breathing. As with Tiffany's visit to the emergency room on July 4, 1984, Dr. Nickol was not able to detect any medical condition on August 16, 1984 for which Tiffany required immediate medical attention. (Dr. Nickol's Deposition, p. 29.) Tiffany was discharged from the emergency room that evening, with Dr. Nickol's advice that the Butterfields take Tiffany to see Dr. Okubo for further pediatric examination. (See medical records attached at Addendum "F".) This was the last time Dr. Nickol saw the child. The Butterfields did not follow Dr. Nickol's advice to take Tiffany in for an exam by Dr. Okubo. (See, the uncontested facts in Dr. Okubo's Summary Judgment memorandum.)

On August 31, 1984, the Butterfields took Tiffany to Dr. Monte McClellan, a family practitioner, for a routine checkup. Dr. McClellan again saw Tiffany on September 27, November 5, November 30, and December 14, 1984. (Dr. McClellan deposition, pp. 7-11 attached hereto as

Addendum "G".) On December 20, 1984, Tiffany died from Sudden Infant Death Syndrome (SIDS).

After filing their Complaint, the Butterfield's allegedly retained Dr. McClellan to give expert testimony at trial as to the improper medical conduct of the appellees. (Answer to Defendants' First Set of Interrogatories, Interrogatory Answer No. 11, attached at Addendum "H".) This representation was made on April 7, 1987. However, during his deposition taken on October 1, 1987, Dr. McClellan indicated that he had, at no time, been retained as an expert by appellants to testify in this case. (Dr. McClellan's Deposition, p. 47.) Appellants eventually admitted, at the summary judgment hearing, that they did not intend to rely upon Dr. McClellan to provide them with the medical expert testimony necessary to prove their medical malpractice claims at trial. (See, Transcript of the Summary Judgment Hearing at R. 212.)

Counsel for Dr. Nickol secured the expert opinion of Dr. Michael C. Pinell, M.D., a Utah board certified family practitioner and emergency medicine physician. After reviewing the emergency room medical records of Tiffany Butterfield from Holy Cross Jordan Valley Hospital for the dates of July 4, 1984, and August 14, 1984, Dr. Pinell concluded that Dr. Nickol's examination and treatment of Tiffany Butterfield was "within the standard of care required of

physicians specializing in emergency medicine." (See, Affidavit attached hereto at Addendum "I".)

On December 29, 1987, Dr. Nickol filed his Motion for Summary Judgment on the grounds that the Butterfields had failed to procure the requisite medical expert testimony necessary to prove their medical malpractice claims at trial. This Motion came on for hearing before Judge Moffat on December 23, 1987, and additional argument pertaining to all appellees' Motions for Summary Judgment was heard on January 4, 1988.

At the December 23, 1987 hearing, the Butterfields argued that the case should not be dismissed for lack of medical expert testimony since they had procured the testimony of H. Barry Jacobs, M.D. (R. at 212.) Dr. Jacobs' affidavit was submitted to the court for consideration on the day of the hearing. (See, Dr. Jacobs' Affidavit attached hereto as Addendum "J".) After reviewing the affidavit, the Court concluded the affidavit was improperly filed and provided insufficient proof that Dr. Jacobs was qualified to testify regarding the standard of care for emergency room physicians such as Dr. Nickol. (See, Transcript of Summary Judgment Hearing at R. 212).

Once the Court had entertained all arguments pertinent to the Motions for Summary Judgment, the Court granted appellees' Motions on January 27, 1988 and specifically

found that the appellees "were not a proximate cause of the infant plaintiff's death inasmuch as there were intervening events that superseded any misconduct on the part of said defendants." (See, Order and Summary Judgment attached hereto as Addendum "A.") At the time the trial court entered its summary judgment ruling, the court had before it uncontroverted evidence that Dr. Nickol had not seen Tiffany Butterfield for more than four months prior to her death, that Tiffany had been treated by Dr. Monty McClellan on at least five occasions during that four-month period, and that the Butterfields had not followed Dr. Nickol's advice to take Tiffany for follow-up visits to Dr. Okubo. (See, Dr. Nickol's Memorandum filed in support of his Motion for Summary Judgment and Dr. Okubo's Summary Judgment Memorandum at p. 4.)

The Butterfield's appealed the lower court's order granting summary judgment. The Court of Appeals heard oral argument on January 26, 1990 and affirmed the lower court's decision on March 28, 1990. (See, Opinion, Utah Court of Appeals, attached hereto as Addendum "B.")

SUMMARY OF ARGUMENT

The Utah Court of Appeals, according due deference to the expert affidavit submitted by the appellants, properly affirmed the trial court's summary judgment dismissal of the appellant's Complaint. Dr. Jacobs' affidavit fails to establish any causal link between Dr. Nickol's emergency room treatment of Tiffany Butterfield and Tiffany's SIDS related death. Tiffany died more than four months after her last visit with Dr. Nickol, and during that four month period she was seen by Dr. McClellan on at least five separate occasions. Further, the Butterfields specifically failed to take Tiffany to Dr. Okubo for the follow-up visits advised by Dr. Nickol. Since these intervening factors isolating Dr. Nickol from any connection with the SIDS death were completely ignored by Dr. Jacobs' affidavit, the trial court and the Court of Appeals correctly ruled that the appellants have failed to put on a prima facie case demonstrating how Dr. Nickol could have caused Tiffany's death.

A R G U M E N T

POINT I

THE UTAH COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S ORDER OF DISMISSAL ON THE BASIS THAT APPELLANTS FAILED TO ESTABLISH HOW DR. NICKOL'S CONDUCT COULD HAVE PROXIMATELY CAUSED TIFFANY BUTTERFIELD'S DEATH

As the Supreme Court reviews the summary judgment rulings rendered in this matter, the Court must scrutinize the facts in the light most favorable to the appellants; additionally, the Court will review the lower courts' legal rulings for correctness. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah App. 1988). As the Court conducts its review, however, it should bear in mind recent U.S. Supreme Court precedent stressing the vital public policy objectives furthered by granting summary judgment in those cases where a plaintiff fails to come forward with a prima facie case. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 276 (1986). Applying the foregoing standards to the present case, the Utah Supreme Court should affirm the Court of Appeals' decision upholding the trial court's summary judgment dismissal of the plaintiffs' Complaint. See, Butterfield v. Okubo, 790 P.2d 94 (Utah App. 1990). Even when the facts of this case are viewed in the light most favorable to the Butterfields, this

Court should rule that the appellants have failed to marshal evidence sufficient to establish that Dr. Nickol's treatment of Tiffany Butterfield somehow caused Tiffany's SIDS related death.

A. Appellants Failed in the Courts Below to Make a Prima Facie Showing that Dr. Nickol Caused Tiffany Butterfield's Death.

In medical malpractice cases, the plaintiff has the burden to prove that the defendant proximately caused the injury. Nixdorf v. Hicken, 612 P.2d 348, 354 n. 17 (Utah 1980) and Hoopiiaina v. Intermountain Health Care, 740 P.2d 270, 271 (1987). "In the absence of evidence, there is nothing upon which a jury can base its findings on the proximate cause of the injury." Huggins v. Hicken, 310 P.2d 523, 526 (Utah 1957). "The evidence must be substantial and must . . . have foundation in expert medical testimony." (Id., footnotes omitted).

In the present case, the undisputed facts are that Tiffany Butterfield died of Sudden Infant Death Syndrome (SIDS) on December 20, 1984, more than four months after she last saw Dr. Nickol in the emergency room on August 16, 1984. The Butterfields did not heed Dr. Nickol's advice regarding follow-up visits with Dr. Okubo. During the four-month period between August 16 and December 20, 1984, the

Butterfields did, however, take Tiffany to Dr. Monte McClellan, a family practitioner, on at least five different occasions (including August 31, September 27, November 5, November 30 and December 14, 1984) for routine care. Dr. McClellan took a complete history of Tiffany's health when the Butterfields brought Tiffany in for her first visit. (Dr. McClellan's deposition, p.7, attached as Addendum "G".) These facts provided the two Courts below with sufficient evidence to indicate that, as a matter of law, Dr. Nickol's treatment of Tiffany Butterfield was not the proximate cause of Tiffany's death.

In Mitchell v. Pearson Enter., 697 P.2d 240 (Utah 1985), the Court defined proximate cause as follows:

> That cause which in natural and continuous sequence, (unbroken by an efficient and intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause -- the one that necessarily sets in operation the factors that accomplish the injury.

Id. at 245-246 (footnotes omitted).

As stated above, Dr. Nickol had not seen or cared for Tiffany Butterfield for over four months prior to her death. Applying Mitchell to the present case, the trial court and the Court of Appeals correctly ruled that this four month period of time, together with Dr. McClellan's numerous examinations of Tiffany, logically insulates Dr. Nickol as the efficient cause of Tiffany's death. The Butterfields

are unable to establish a natural and continuous sequence of events that links Dr. Nickol's E.R. exams to Tiffany's death since she was seen and treated on at least five separate occasions by Dr. McClellan during that time. Additionally, the Butterfields' failure to take Tiffany to Dr. Okubo for follow-up visits (despite Dr. Nickol's advice to do so) further isolates Dr. Nickol from any causal link with Tiffany's death.

It is generally true that the issue of proximate cause is a factual issue and in most circumstances cannot be resolved as a matter of law. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985). However, in certain circumstances where the evidence is such that a jury can do no more than guess or conjecture as to which of several acts, conditions or agencies was in fact the efficient cause of the plaintiff's injuries, it is for the Court to decide as a matter of law that the plaintiff's case has not been established. Thomas Helicopters, Inc. v. San Tan Ranches, 633 P.2d 1145, 1148 (Idaho 1981). See, also, Thompson v. Presbyterian Hospital, Inc., 652 P.2d 260 (Okla. 1982) (proximate cause becomes a question of law when there is no evidence from which a jury could reasonably find a causal nexus between the negligent act and the resulting injury); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983) (question of whether

proximate cause exists is one for trier of fact unless evidence shows that reasonable persons could not disagree).

Petitioners argue that Dr. H. Barry Jacobs' affidavit presents a question of fact. However, the only statement Dr. Jacobs makes in regard to proximate cause is that, in his opinion, the care provided by the appellees constitutes care below the accepted standard and "was the proximate cause of the child's demise from SIDS." Dr. Jacobs' statement is conclusory and unsupported by specific facts that can give rise to a jury question. See, Rule 56(e), Utah Rules of Civil Procedure (requiring that an affidavit in opposition to a Summary Judgment motion must "set forth specific facts showing that there is a genuine issue for trial"). Dr. Jacobs makes no attempt in his affidavit to account for and explain events that occurred between the time Tiffany last saw Dr. Nickol and the time she died four months later, nor does he explain what effect Dr. McClellan's care may have had on Tiffany prior to her death. Finally, Dr. Jacobs neglects to mention the fact that the Butterfields failed to heed Dr. Nickol's advice to take their child for follow-up visits to Dr. Okubo on each of the days immediately following Tiffany's emergency room visits.

Dr. Jacob's affidavit fails to establish the requisite causal link between Dr. Nickols' treatment of Tiffany and her death under the standard set forth in Gaw

v. DOT, 798 P2d. 1130 (Utah App. 1990). In Gaw, the Court held that an expert's affidavit filed in opposition to a summary judgment motion will be sufficient when it articulates "the facts upon which the [expert] opinion [is] based . . . if the facts are of the type usually relied upon by experts of the field (citations omitted)." 798 P2d. at 1137. Dr. Jacobs' affidavit clearly fails to specify the factual basis for his conclusion regarding Dr. Nickol's causation of Tiffany's death. Without a specific factual analysis of how Dr. Nickol could have caused Tiffany's death given the four months between her death and Dr. Nickol's last treatment of Tiffany, and given the five intervening office visits to Dr. McClellan, Dr. Jacobs' affidavit fails to set forth those facts ordinarily relied upon by experts in order to establish their opinions as required by Gaw. Accordingly, Dr. Jacobs' affidavit in no way creates a genuine issue of material fact regarding Dr. Nickol's alleged causation of Tiffany's death.

The Butterfields have simply failed to establish any causal link between Dr. Nickol's conduct and Tiffany Butterfield's death. The affidavit of Dr. Jacobs is insufficient to create a natural and continuous sequence of events connecting Dr. Nickol's care to the SIDS death.

B. The Issues of Proximate Cause and Intervening Events were Sufficiently Raised by Appellees at the Trial Court Level.

The facts of this case, as set forth in Dr. Nickol's Memorandum in Support of his Motion for Summary Judgment, indicate that there was more than a four-month period between the time Tiffany Butterfield was seen by Dr. Nickol until her death on December 20, 1984. (R. at 147-48.) Further, the trial court had before it uncontroverted evidence that the Butterfields took Tiffany to see Dr. McClellan on at least five occasions prior to her death. (See,Dr. Okubo's uncontroverted Summary Judgment memorandum.) The trial Court also considered, in rendering its ruling, the uncontroverted fact that the Butterfields did not take Tiffany to Dr. Okubo for follow-up exams recommended by Dr. Nickol. (Id.)

The convergence of four factors gave rise to the trial court's summary judgment ruling: (1) The remoteness of time and (2) the intervening care rendered by Dr. McClellan, coupled with (3) the Butterfields' failure to take Tiffany in to Dr. Okubo for follow-up care and (4) the expert testimony of Dr. Michael C. Pinell regarding Dr. Nickol's compliance with the requisite standard of care, presented the trial court with significant evidence indicating that Tiffany's death must have been caused by "intervening

events that superseded misconduct [if any] on the part of Dr. Nickol." Even if Dr. Pinell's opinion regarding the standard of care issue is cancelled out by Dr. Jacobs' opinion, the remaining three factors outlined above provide an ample basis for affirming the Court of Appeals' decision in this case.

C. The Court of Appeals Properly Ruled on Lack of Proximate Cause Even if the Lower Court Erred in Referring to Intervening Events that Superseded any Misconduct on the Part of the Dr. Nickol.

In its opinion, the Court of Appeals correctly states that the allegation of causation is a critical element of the Butterfields' prima facie case, and that "without proof of proximate cause, the plaintiffs cannot recover in tort (citations omitted)." 790 P2d. at 98. The Court found that the Butterfields failed to come forward with evidence of a causal link and found the affidavit of Dr. Jacobs to be insufficient to establish such a link. Id.

On page two of the Butterfields' Petition for Writ of Certiorari, appellants argue that the Court improperly shifted the burden to appellants to show a lack of intervening factors. That simply is not the case. The Butterfields never came forward with enough evidence to even make out a prima facie case against Dr. Nickol. Dr. Jacobs' affidavit does not establish a causal link between Dr. Nickols'

treatment of Tiffany and her SIDS related death. Therefore, the burden always remained with the appellants, and Dr. Nickol had no duty to rebut the insufficient evidence. In Jackson v. Hicks, 738 P.2d 1037, 1039 (Utah 1987) this Court stated:

> When a plaintiff has failed to make out even a prima facie case concerning causation, it would be meaningless to require defendant to produce substantial evidence to rebut evidence which, as a matter of law, is insufficient to support the award.

Id. at 1039.

Since the Butterfields never satisfied their initial burden of proof, the burden was never shifted from them. The Court of Appeals properly ruled that the Butterfields failed to carry this burden due to the insufficiency of Dr. Jacobs' affidavit.

Further, the Court of Appeals properly observed that Dr. Jacobs' affidavit does nothing to rebut Dr. Nickol's strong causation defense put on at the summary judgment hearing. 790 P.2d at 98. Dr. Nickol presented the trial court with substantial evidence that an intervening event or set of events occurred sufficient to isolate Dr. Nickol from the cause of Tiffany's SIDS related death. As indicated above, not only did the trial court have before it uncontroverted evidence that Dr. Nickol had not seen Tiffany for more than four months prior to her death, but the trial court was also provided with uncontroverted evidence that

Tiffany had been seen and treated by Dr. Monty McClellan on at least five separate occasions in that four-month period. (See both Dr. Nickols' and Dr. Okubo's memoranda filed in support of their Motions for Summary Judgment.) In view of this uncontroverted evidence advanced by Dr. Nickol, the Court of Appeals properly concluded that Dr. Jacobs' affidavit doesn't begin to address the factors isolating Dr. Nickol from the cause of Tiffany's death. Accordingly, the Court of Appeals correctly upheld the lower court's decision to dismiss the appellants' case.

D. Contrary to Appellants' Contention, the Court of Appeals did not Weigh the Expert Affidavits Proferred in this Case.

Appellants contend that the Court of Appeals' decision must be reversed because the Court improperly weighed the expert affidavits submitted in this case. Specifically, appellants argue that the expert affidavits submitted by the appellees were given more weight and accorded more authority than was the affidavit submitted by the appellants' expert, Dr. Jacobs. The appellants' argument in this regard is incorrect.

As the Court of Appeals points out on page 97 of its Opinion, the Court went out of its way to afford due deference to Dr. Jacobs' affidavit and to view that affidavit in the

light most favorable to the appellants. 790 P.2d at 97. Indeed, the Court of Appeals went so far as to rule that Dr. Jacobs was qualified to testify as an expert in all three areas of malpractice involved in this case (i.e., pediatric medicine, emergency room medicine, and hospital nursing staff practice). Id. The Court of Appeals clearly afforded the statements and allegations contained in Dr. Jacobs' affidavit every benefit of the doubt.

Even affording the affidavit its due deference, however, the Court of Appeals was forced to conclude that the affidavit failed to establish the causal link between Dr. Nickol's emergency room treatment of Tiffany Butterfield and her SIDS related death some four months after that treatment had occurred. The appellants cannot contend in good faith that the Court of Appeals failed to afford proper deference to Dr. Jacobs' affidavit simply because that affidavit is insufficient to establish the prima facie case of proximate cause necessary to allow the appellants' claims to proceed to trial.

CONCLUSION

The Court of Appeals properly affirmed the District Court's Order of Dismissal on the basis that Appellants failed to establish even a prima facie case linking Dr. Nickol's conduct to the proximate cause of Tiffany Butterfield's death.

For the above stated reasons, Dr. Nickol respectfully requests that the Court of Appeals' decision in this matter be affirmed.

DATED this 10 day of December, 1990.

RICHARDS, BRANDT, MILLER
& NELSON

GARY D. STOTT
MICHAEL A. PETERSON
Attorneys for Appellee Nickol

JOHN02/MAP
jb62690

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing Appellee's Brief to be served on the following counsel of record by placing four true and correct copies of the same in the United States Mail, first class mail, postage prepaid, at Salt Lake City, Utah on this 20 day of December, 1990:

David L. Grindstaff
395 South 600 East
Salt Lake City, Utah 84102
(801) 363-1370
Attorney for Plaintiffs/ Appellants

R. Scott Williams
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Appellee Okubo

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145
Attorneys for Appellee Holy Cross

GARY D. STOTT
MICHAEL A. PETERSON
Attorneys for Defendant/
Appellee Nickol

A D D E N D U M A

R. Scott Williams, #3498
STRONG & HANNI
Attorneys for Defendant Okubo
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---------oooOooo---------

ALBERT JOHN AND ANGELA BUTTERFIELD, as guardians and parents of and on behalf of TIFFANY RUTH BUTTERFIELD,	:	ORDER AND SUMMARY JUDGMENTS
Plaintiffs,	:	
-vs-	:	
DAVID OKUBO, THOMAS NICKOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5,	:	Civil No. C86-9250 Judge Richard Moffat
Defendants.	:	

---------oooOooo---------

The defendants David Okubo, Thomas Nickol, and Holy Cross Jordan Valley Hospital's Motions for summary judgment having come up for hearing on December 23, 1987, and the court having heard additional arguments on January 5, 1988, and the court having reviewed the memoranda and affidavits in this matter, and the court having found as follows:

1. Plaintiffs have not established through competent

or qualified expert testimony that defendants breached the requisite standard of care required of them in the treatment administered to the infant deceased plaintiff Tiffany Ruth Butterfield.

2. The defendant Holy Cross Jordan Valley Hospital is not liable to plaintiffs as a matter of law inasmuch as the hospital employees involved in this case cannot practice medicine, and are not held to the standard required of the individual practicing physicians.

3. In addition, the alleged misconduct on the part of all the respective defendants, David Okubo, Thomas Nickol and the Holy Cross Jordan Valley Hospital, were not a proximate cause of the infant plaintiff's death inasmuch as there were intervening events that superceded any misconduct on the part of said defendants.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions for summary judgment of David Okubo, Thomas Nickol and Holy Cross Jordan Valley Hospital be and the same are hereby granted and defendants are awarded a judgment against plaintiffs, no cause of action, together with costs.

DATED this 27 day of January, 1988.

BY THE COURT:

Richard H. Moffat
District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK
By K Gutierrez
Deputy Clerk

A D D E N D U M B

Albert John BUTTERFIELD and Angela Butterfield, on Behalf of Tiffany Ruth BUTTERFIELD, Plaintiffs and Appellants,

v.

David OKUBO, Thomas Nickol, and Holy Cross Jordan Valley Hospital, Defendant and Respondents.

No. 880347-CA.

Court of Appeals of Utah.

March 28, 1990.

In medical malpractice action, the Third District Court, Salt Lake County, Richard H. Moffat, J., dismissed action on motion for summary judgment, and appeal was taken. The Court of Appeals, John Farr Larson, Senior Juvenile Judge, held that: (1) affidavit in opposition to motion for summary judgment was admissible, and (2) there was insufficient evidence of proximate causation.

Affirmed.

1. Judgment ⇐185.1(1)

Certificate attesting to proper service of affidavit in opposition to motion for summary judgment was to be taken at face value, and unsworn verbal representations of movant's counsel about defects in service, representations based in part on hearsay conversations with their office personnel, did not suffice to establish facts showing fatal deficiencies in service of affidavit. Rules Civ.Proc., Rule 56(c).

2. Physicians and Surgeons ⇐18.80(8)

Ordinarily, expert medical testimony must be presented in order to establish standard of care by which doctor's conduct is to be measured and that patient's injury was proximately caused by conduct of doctor that fell below that standard; furthermore, the expert testimony, like the standard of care which is its subject matter, is specific to the particular medical specialty or area of expertise of defendant.

3. Evidence ⇐538

One physician is not qualified to give admissible opinion on treatment provided by another physician, unless physician giving the opinion is shown to have familiarity with treating physician's particular area of practice.

4. Judgment ⇐185.3(21)

While there was reason to question whether affiant physician's apparently rather eclectic background qualified him as an expert in all three of defendant physicians' fields of medical practice, his representations of his competence were not so patently unfounded or conclusory that his opinion concerning standard of care could be wholly disregarded on motion for summary judgment.

5. Physicians and Surgeons ⇐18.80(5)

There was no evidence establishing causal link between physicians' treatment of infant and her death of sudden infant death syndrome.

6. Torts ⇐15

Element of proximate causation in tort case inquires into whether defendant could, under the circumstances, reasonably have foreseen that harm of which plaintiff complains could result from defendant's breach of standard of care.

David Grindstaff (argued), Quintana & Grindstaff, Attorneys for Appellants Salt Lake City, for plaintiffs and appellants.

David W. Slagle (argued), Snow, Christensen & Martineau, Salt Lake City, for Holy Cross Jordan Valley Hosp.

Gary D. Stott, Michael A. Peterson, Curtis Drake (argued), Richards, Brandt, Miller & Nelson, Salt Lake City, for Thomas Nickol.

R. Scott Williams (argued), G. Eric Nielson, Strong & Hanni, Salt Lake City, for David Okubo.

Before DAVIDSON, JACKSON, and LARSON [1], JJ.

1. John Farr Larson, Senior Juvenile Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp.1989).

OPINION

JOHN FARR LARSON, Senior Juvenile Judge:

Albert and Angela Butterfield appeal from a summary judgment dismissing this action for wrongful death, which they allege to be due to medical malpractice by the defendants. Because of a lack of evidence in the record concerning proximate cause, we affirm.

The Butterfields' infant daughter Tiffany died at home on December 20, 1984 of sudden infant death syndrome. She was born June 30, 1984. On that day and again on July 16, 1984, Tiffany was examined by Dr. David Okubo, a pediatrician. On two occasions in July and August 1984, the Butterfields noted apparent problems in Tiffany's breathing and took her to the emergency room of Holy Cross Jordan Valley Hospital ("Holy Cross"), where she was examined and treated by Dr. Thomas Nickol, an emergency room physician and general practitioner. Thereafter, the Butterfields placed Tiffany exclusively in the care and treatment of Dr. Monty McClellan, a family practitioner. He examined Tiffany on five occasions in August through mid-December, 1984.

Following his August 16, 1984 examination, Dr. Nickol recommended close observation of Tiffany's breathing with attention to possible cyanosis or blue discoloration. However, neither Drs. Nickol or Okubo nor Holy Cross referred the Butterfields to a physician with more extensive expertise specifically in infant breathing disorders. They also did not recommend the use of home apnea monitoring equipment. The record does not indicate what, if any, care or treatment was provided by Dr. McClellan for Tiffany's breathing problems during the last four months of her life.

After Tiffany's death, the Butterfields sued Drs. Nickol and Okubo and Holy Cross (but not Dr. McClellan) for medical malpractice, filing their complaint on December 15, 1986. On August 25, 1987, the district court held a scheduling conference, after which an order issued stating that "All discovery must be completed, including the filing of depositions[,] by December 11, 1987." On December 11, 1987, the Butterfields moved to extend the discovery deadline in relation to Holy Cross, and on December 23, 1987, in relation to Dr. Nickol. On December 10 and 11, 1987, the defendants filed motions for summary judgment accompanied by affidavits stating in essence that the defendants' treatment of Tiffany had not fallen below the applicable standard of care and was not the cause of her death. The court heard those motions on December 23, 1987. The Butterfields had no expert testimony in the record in their favor until the day before the summary judgment hearing, when they filed an affidavit by Dr. H. Barry Jacobs. They attempted service of the Jacobs affidavit on opposing counsel that evening and/or the next day. The copy intended for Dr. Nickol's counsel was left with a security guard employed at the office building at which counsel works, and Dr. Okubo's counsel could not locate any served copy until after the summary judgment hearing.

The trial court noted the apparent defects in service of the Jacobs affidavit, and seems to have concluded that, with or without the Jacobs affidavit, the Butterfields had failed to establish a prima facie case because no competent expert testimony indicated either a breach of the standard of care or that the defendants' medical treatment proximately caused the child's death. The principal [2] issues presented are there-

2. The Butterfields also argue that the district court should have granted their motion to extend the time limit for completion of discovery. However, we find no abuse of discretion in the trial court's scheduling of the case See Utah R.Civ.P 16(b); 3 J Moore, *Moore's Federal Practice* ¶ 16.22 at 16–123 (2d ed 1989). Moreover, since the case was properly dismissed on summary judgment, additional time for discovery would serve no purpose. The Butterfields were not entitled to delay the summary judgment because they failed to proceed under Utah R. Civ.P. 56(f). *See Cox v. Winters*, 678 P.2d 311, 314 (Utah 1984), *Reeves v. Geigy Pharmaceutical, Inc*, 764 P.2d 636, 639 (Utah Ct.App.1988); *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278–79 (Utah Ct.1987).

fore (1) whether the Jacobs affidavit is entitled to consideration in ruling on the motion, and (2) whether there is sufficient evidence in the record to create a factual issue about whether the defendants both breached the standard of care applicable to each and thereby proximately caused Tiffany's death

Service of the Jacobs Affidavit

As courts have often noted, a party opposing a motion for summary judgment that is supported by affidavits and/or other evidentiary materials "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise must set forth specific facts showing that there is a genuine issue for trial If he does not so respond, summary judgment, if appropriate, shall be entered against him" [3] In this case, therefore, the Butterfields had to introduce evidence supporting those elements [4] of their case that had been effectively challenged by the defendants in moving for summary judgment A major part of the Butterfields' evidence was the Jacobs affidavit

The defendants argue that the Jacobs affidavit should not be considered because it was not properly served on their counsel Axiomatically, an affidavit in opposition to a motion for summary judgment must not merely be filed with the court, it must also be served on opposing counsel no later than the day before the hearing on the motion,[5] to allow them an opportunity to prepare for the hearing We have previously noted that an affidavit that has not been properly served should not be considered, and the motion may be resolved without it *P & B Land, Inc v Klungervik*, 751 P 2d 274, 277 (Utah App 1988)

[1] In this case, however, the facts relating to the lack of service were not suitably established The Jacobs affidavit was accompanied by a certificate attesting to proper service The only evidence to the contrary in the record is the unsworn verbal representations of counsel about the defects in service, representations based in part on hearsay conversations with their office personnel While we have no reason to question the accuracy of counsel's representations, the Jacobs affidavit was nevertheless the principal feature of the Butterfields' opposition to the potentially dispositive motions for summary judgment The certificate of service is entitled to be taken at face value, unless admissible evidence shows it to be erroneous The representations of counsel, though entirely credible as far as they go, are nevertheless not evidence, and therefore do not suffice to establish facts showing fatal deficiencies in the service of the Jacobs affidavit We therefore consider the Jacobs affidavit in determining whether the Butterfields came forward with sufficient evidence to warrant denial of summary judgment

Standard of Care

[2, 3] Due to the technical and complex nature of a medical doctor's services, expert medical testimony must ordinarily [6] be presented in order to establish the standard of care by which the doctor's conduct is to be measured and that the injury was proxi-

3. Utah R Civ P 56(e), *Busch Corp v State Farm Fire & Casualty Co*, 743 P 2d 1217 (Utah 1987) *Franklin Fin v New Empire Dev Co*, 659 P 2d 1040 1044 (Utah 1983)

4. Briefly, to recover for medical malpractice, the plaintiff must show that he or she suffered an injury that was actually and proximately caused by an act or omission of the medical professional that fell below the standard of care for that professional s medical field or specialty *See Robinson v Intermountain Health Care Inc* 740 P 2d 262 (Utah App 1987) *Hoopiiana v Intermountain Health Care Inc* 740 P 2d 270 (Utah App 1987)

5 Utah R Civ P 56(c)

6 An exception is made where the physician s error is so plain and simple that it is within the range of ordinary lay knowledge For example in *Nixdorf v Hicken* 612 P 2d 348 (Utah 1980) a surgeon left a surgical cutting needle inside the plaintiff's body, and the court held that expert testimony on the standard of care was not needed in essence because everybody knows that a surgeon should not leave inside a sharp foreign object used to make the incision In this case however whether the defendants should have taken additional steps to prevent future apnea is a factual question not within the range of ordinary lay knowledge

mately caused by conduct of the doctor that fell below that standard of care *Anderson v Nixon*, 104 Utah 262, 139 P 2d 216, 220 (1943), *Chadwick v Nielsen*, 763 P.2d 817, 821–22 (Utah App 1988), *Martin v Mott*, 744 P 2d 337, 338 (Utah App 1987), *Robinson v Intermountain Health Care, Inc.*, 740 P 2d 262, 264 (Utah App 1987) Further, the expert testimony, like the standard of care which is its subject matter, is specific to the particular medical specialty or area of expertise of the defendant In other words, one physician is not qualified to give an admissible opinion on the treatment provided by another physician, unless the physician giving the opinion is shown to have familiarity with the treating physician's particular area of practice [7]

[4] The expert affidavits submitted by the defendants in moving for summary judgment indicate both that the attesting expert was qualified to render an opinion on the standard of care applicable to the particular defendant about which he was speaking, and that the defendant's treatment of Tiffany did not fall below that standard The question thus becomes whether Dr Jacobs also indicated familiarity with the standards of care applicable to the defendants sufficient to warrant consideration of his opinion In that regard, Dr Jacobs stated

> 1 I am a physician licensed in the State of Maryland and am a Board Certified Surgeon since 1974 I have past experience in Emergency Room care at four hospitals, and Pediatrics, having cared for patients in private practice and hospitals, including the Children's Hospital in Washington, D C
>
> 3 I am familiar with the Standard of Care, applicable in 1984, required in pediatrics and emergency room medicine, as well as hospital responsibility for adequate record keeping and availability of previous records during later follow up care for a related complaint

Based on those statements, there is reason to question whether Dr Jacobs' apparently rather eclectic background qualifies him as an expert in all three of the defendants' fields of medical practice However, our role is not to cross-examine the affidavit by conjecture, [8] rather we take it at face value, viewing the evidence in the light most favorable to the Butterfields, since they lost the summary judgment motions in the court below [9] In that light, Dr Jacobs' representations of his competence are not so patently unfounded or conclusory that they can be wholly disregarded Because Dr Jacobs' opinion concerning the standard of care contradicts those of the defendants' experts, it demonstrates the existence of a dispute of material fact, which precludes summary judgment on the question of the standard of care

Proximate Causation

[5] However, while Dr Jacobs' criticizes the defendants' treatment of Tiffany, he does not establish the requisite causal link between that treatment and Tiffany's death Dr Jacobs opines that the defendants' failure to prescribe home monitoring of Tiffany's breathing, and perhaps also a more generalized inattention to Tiffany's breathing problems, constitute treatment falling below the standard of care However, those asserted errors occurred in mid-1984, whereas Tiffany died on December 19, 1984, four months after she had been placed in the care of another medical practitioner The defendants argue that these facts, along with expert opinion, indicate that their treatment of Tiffany did not proximately cause her death Dr Jacobs, however, ignores the causation question

[6] The element of proximate causation in a tort case inquires into whether the

7. *Burton v Youngblood*, 711 P 2d 245 247–48 (Utah 1985) *see also Chadwick*, 763 P 2d at 822

8 *See Reeves*, 764 P 2d at 639 (In considering a motion for summary judgment it is not appropriate for a court to weigh the evidence or assess credibility[ ])

9. *Branam v Provo School Dist*, 780 P 2d 810 (Utah 1989) *Blue Cross & Blue Shield v State*, 779 P 2d 634 636 (Utah 1989), *Atlas Corp v Clovis Nat'l Bank* 737 P 2d 225, 299 (Utah 1987)

defendant could, under the circumstances, reasonably have foreseen that the harm of which the plaintiff complains would result from the defendant's breach of the standard of care. *See Jackson v. Hicks*, 738 P.2d 1037, 1039 (Utah 1987); *Mitchell v. Pearson Enters., Inc.*, 697 P.2d 240, 245–47 (Utah 1985); *Williams v. Melby*, 699 P.2d 723, 728–29 (Utah 1985). Without proof of proximate cause, the plaintiff cannot recover in tort. *Dowell Div. of Dow Chemical U.S.A. v. Del-Rio Drilling Programs, Inc.*, 761 P.2d 1380, 1384 (Utah 1988); *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1082–83 (Utah 1985).

When proximate causation was called into question by the defendants in moving for summary judgment, it was incumbent on the Butterfields to come forward with evidence of a causal link between the purported malpractice and the harm for which they seek damages.[10] However, there is nothing in the Jacobs affidavit to indicate that the defendants' medical treatment proximately caused Tiffany's death, or even caused her death at all. From the record, we cannot exclude the possibility that the defendants may have erred, but fortuitously, their error was not a cause, or a substantial enough cause, of Tiffany's death.[11] The allegation of causation, a critical element of the Butterfields' prima facie case, thus remains unsubstantiated.

Conclusion

We conclude that the Jacobs affidavit was before the court, absent evidence indicating that it was not properly served. That affidavit, though conclusory, nevertheless introduces enough apparently competent expert testimony to create a factual dispute on the question whether the defendants' treatment of Tiffany Butterfield fell below the applicable standards of care. However, even viewing the facts in the light most favorable to the Butterfields, there is a dearth of evidence in the record to counter the defendants' assertions that their treatment of Tiffany did not proximately cause her death.

We therefore affirm the district court's order of dismissal.

DAVIDSON and JACKSON, JJ., concur.

10. *Hunt v. Hurst*, 785 P.2d 414, 415–16 (Utah 1990).

11. *Cf. Reeves*, 764 P.2d at 642.

STATE of Utah, Plaintiff and Respondent,

v.

Erlene Kay STRIEBY, Defendant and Appellant.

No. 890124–CA.

Court of Appeals of Utah.

March 30, 1990.

Defendant was convicted in the Third District Court, Tooele County, Kenneth Rigtrup, J., of manslaughter, a second-degree felony, and she appealed. The Court of Appeals, Greenwood, J., held that: (1) State was not required to prove absence of self-defense in order to establish prima facie case of manslaughter, and (2) evidence was insufficient to support conviction.

Reversed.

Bench, J., filed concurring and dissenting opinion.

1. Homicide ⇐151(3)

State was not required to prove absence of self-defense in order to establish prima facie case of manslaughter. U.C.A. 1953, 76-2-402, 77-17-3, 77-35-17(*o*).

2. Homicide ⇐244(1)

Evidence was insufficient to support defendant's conviction of manslaughter for shooting of her husband in response to his violent physical attack; the weight of evi-

A D D E N D U M C

do not.

Q Do you have a copy of the record?

A Yes.

Q Have you reviewed it prior to coming to this deposition?

A Yes.

Q So you can testify as to what you recall concerning the first visit on July 4th.

A From the record.

Q From the record. Do you have an independent recollection of the --

A I do not.

Q -- of the first visit? What about on the August 16th visit -- do you have a recollection of that visit?

A I do not, other than from the record.

Q If the Butterfields were present, would you be able to recognize them, the Butterfield parents --

A No.

Q -- John and Angela? Let me ask you what you remember after reviewing the record of what occurred on July 4th regarding the Butterfield child.

A I remember, again, from reviewing the

record, that the child had been brought in by the mother complaining of congestion. And in evaluating the child it appeared that the child was awake and alert and could not find any physical findings with the child that were a concern. I reassured the mother that I felt the child appeared to be growing normally. As I recollect, again, from reviewing the record, the birth weight was seven pounds, and the initial visit had a weight of seven and a half pounds. So that the child had surpassed birth weight by, I believe it was six days to seven days of age. And, again, I reassured the mother that seemed like normal growth.

Q Now what you are telling me is just what you recall from reading the record. You don't remember seeing the child.

A That's correct.

MR. STOTT: As he indicated to you, he has no recollection at all of either of those visits, Dave, other than --

MR. GRINDSTAFF: That's fine.

MR. STOTT: -- other than reading to you what is on the written record.

Q Let me ask you, would it be normal

was improved with suctioning of the nose. And, again, in reviewing it and examining the child, did not feel that there were any significant abnormalities which, again, under the assessment would be indicated by normal well child check, which is what W.C.C. stands for.

Q What does this remark, Dr. Okubo who did not remember any A.B.O. incompatibility -- what would that mean to you?

A I spoke with Dr. Okubo and asked his recollection about any blood type differences between the mother and the baby. And there were none, to his recollection.

Q Do you recall speaking to Dr. Okubo?

A Again, no independent recollection, but from the chart I did speak with him. And I would have -- it would have been over the phone, although, again, I would just have to say that I spoke with him, because I just have to rely on the record.

Q Let's go down to where it says "P" And it goes, "parent reassurance." The line below, what does that say?

A Follow-up with Dr. Okubo in a.m. or sooner for any increased symptoms. And then

that's rewritten down at the bottom. Again, follow-up, Dr. Okubo in a.m., or sooner for increased symptoms.

Q Do you recall looking at this report -- does this tell you what parent you would have seen on this occasion?

A In looking at my record I didn't indicate, again, whether I saw a mother or father. In looking at the nurse's record it would appear it would have been the mother.

Q Okay. Do you have a subsequent report, August 16th, '84 --?

A Yes.

Q -- entitled "Emergency Room" dealing with Tiffany Butterfield?

A Yes.

Q Do you have any independent recollection of this visit, other than what is on this report?

A No.

Q Let me ask you on this report what portions would be your own handwriting.

A Again, all of the physician notes were my handwriting, condition on discharge.

Q When you receive a patient --

A The time might be mine. I don't know.

Q Apparently -- would this not be true that it says that there were problems breathing?

A It indicates that the mother was concerned about an irregular breathing pattern. She indicated that she felt there were approximately four second periods where the child did not breathe, although the child did not become cyanotic, which is what blue discoloration is, and that the child was eating, voiding and stooling normally and that mother, again, was concerned about nasal congestion. The period, again, of four seconds without breathing, or an irregular breathing pattern, in a new born is not necessarily abnormal.

Q Okay. Would you read the part after the nasal congestion and read to me what that -- would you read all your notes and tell me what that would mean about the condition of the person that you might have seen?

A The "O" stands for objective, which is the physical examination. The general exam

revealed awake and alert normal, active for age. "H.E.E.N.T." stands for head, ears eyes, nose and throat. "P.E.R.R.L.A." stands for pupils equal, round, and reactive to light and accommodation. "E.O.M.I." is external ocular muscles intact. Fontanel, soft. Mucous membranes moist. Slight nasal congestion. Neck supple. Lungs clear. No wheezes, rhonchi or stridor. Abdomen, bowel sounds present. Extremities, good color. (Pink). Neurologic exam appropriate for age. Assessment, normal well child check. Plan, monitor for increased respiratory distress with cyanosis (blue discoloration). Humidifier, bulb suction, continued formula feeding. Follow up with Okubo for two month check and immunization, sooner for problems. Condition at discharge, good. Time of discharge 0040.

Q Okay. Would you typically ask for a history from the mother --

A Yes.

Q -- of prior problems? From this report can you tell me whether or not you asked whether there had been prior problems?

A From the records here it, again,

A My understanding of SIDS is that it is an idiopathic disorder affecting primarily males in the first year of life with the peak incidence between two and four months; that it has a seasonal predilection between October and March; that, again, there are certain risk factors, that it is the most common cause of infant death, has the incidence of about two per thousand live births. And that, again, there is no -- at least at this time, no known cause for the SIDS. It doesn't seem to be contagious, doesn't seem to be related to an infectious problem, pneumonia, that type of thing.

Q Had you been exposed to actual SIDS patients prior to '84, July of '84?

A Yes.

Q How many patients?

A I don't know.

Q Had you ever referred a patient to another specialist for possible SIDS evaluation?

A Not the emergency room. Again, in working the emergency room the primary job that I have as an emergency room specialist is to

attempt to determine whether a patient needs to be admitted to the hospital. The majority of patients will have their own private physician. And the evaluation of SIDS, or a predilection for SIDS, usually is going to be started by the private physician if there is a concern. On the emergency room physician's shoulders lies the responsibility of whether a patient, again, needs to be admitted to the hospital for observation or care of the individual patient. So the actual referral for a SIDS evaluation most times is going to be done through the private physician's office if there is a concern, or if there is a concern on the emergency room physician's part, again, an admission will occur and then further workup if deemed necessary by the private physician, not the emergency room doctor.

Q Okay. As I understand, you are saying your role was different than the role of a family physician as an emergency room physician.

A Definitely.

Q And what you described to me as what your role as an emergency room physician would

be -- where would you learn what your role would be as an emergency room physician?

A Again, during the training that I had in family practice part of that training is spent during rotations in emergency rooms working with established emergency practicioners and being trained and supervised by them prior to, again, being independent.

Q Would an emergency room physician refer someone who had heart problems, for example, to the family practitioner, or would --

A Potentially.

Q Would it be common for you to refer someone with heart problems to a cardiologist?

A Not if they had their own physician.

Q If they had their own physician. What about if someone had a skin disorder, would you refer them to their family practitioner?

A If they had their own physician you are going to contact the patient's own physician before you are going to make a referral to a subspecialist. Again, as a matter of courtesy if nothing else. But the

standard at least is to talk to the private physician because they have a better working relationship in the dealings with the patient. They have been taking care of them more than once or twice, which is the usual situation in the emergency room.

Q Would that be true even if there is an emergency situation, that before you would bring in a cardiologist or a heart expert, you would always contact the individual's personal family physician?

A Well, the words "always" are a little bit difficult to substantiate, but given the absence of extenuating circumstances, contacting the private physician is the usual protocol and standard, that's correct.

Q What would be extenuating circumstances such that you normally wouldn't go through the family physician?

A Oh, for instance if a person had a private family physician but came in with a situation needing emergent thoracotomy or surgery, you might have to call the surgeon to be involved with a life saving maneuver and then call the private practitioner. In other

A D D E N D U M D

time we got to the hospital, and I explained to the doctor, Dr. Nickol, that she had went blue and that we had to stimulate her to catch her breath all the way from our home to the hospital. And he checked her out and sort of laughed at it and said that there was nothing wrong with her, she's developing a breathing pattern and that she'd be fine. And he called Dr. Okubo at that time and talked to him, and I don't know what was said. And he just told me to call Dr. Okubo tomorrow and discuss it with him and I did.

Q What do you mean, he kind of laughed?

A They laughed.

Q Who is "they"?

A Dr. Nickol and the nurse. You know, they really thought it was funny, but I was scared and so was my husband. She had quit breathing and they laughed it off like it was no big deal, she's establishing a breathing pattern, you're bothering me. That's how they made us feel, like we were freaking out on our baby, but we weren't.

Q Did they tell you what they meant by "a breathing pattern"?

A They said that babies have to develop a breathing pattern, anybody does. As they get older, they develop different breathing patterns, and babies, they develop a breathing pattern very slowly. Sometimes they breathe fast, sometimes they breathe slow, and he said, Don't worry, she's

A Yes.

Q And you didn't see a doctor in the meantime; is that correct?

A After the 16th?

Q No, between the 5th of July and the 16th of July, you didn't go see another doctor, did you?

A No.

Q When was the next breathing problem or the next incident with Tiffany, whatever it may have been?

A August 16.

Q Where?

A At home.

Q What time of day?

A It was at night. I don't recall the time exactly. It was after 8:00.

Q After 8:00 and before midnight?

A Yes.

Q What happened?

A Me and John were both home and we both seen her go limp and lose her breath.

Q Where was she?

A On the couch.

Q What were you folks doing?

A Watching TV and, you know, talking with my other daughter. She was in kindergarten at that time, and we were

talking with her. And we just took her to the hospital again.

Q Mrs. Butterfield, I know that it may be difficult to go through this, but we need to know the details of what happened that evening, what you saw her doing, what you folks did with her.

A She wasn't breathing, that's what we saw. That night I carried her in the car, and I stimulated her all the way to the hospital. I didn't pinch her, I had to pat her back or I would move her up and down like this (indicating) to get her to catch her breath. Yes, she was not breathing at that time at all.

Q In the home, what first called your attention to her?

A My kids, I pay attention to all the time. And even with Melissa when she was a baby, I used to check her to see if she was breathing, because at the time it wasn't called SIDS, it was called crib death, and I just had -- she was sitting right next to me, and I used to keep my hand on top of her like this.

Q This is Melissa?

A No, this is Tiffany. And to feel them breathe, and I did that with Melissa when she was a baby, too. And she quit breathing.

Q And you felt her quit breathing?

A Yes, I did.

A We took her in there, she was checked again by Dr. Nickol, and he said the same thing, she's developing a breathing pattern, don't worry about it, and really made me feel foolish.

Q Did you recognize him that time as having seen her before?

A Yes.

Q Did you tell him what had happened that evening?

A Yes.

Q And his response to you was what?

A She's establishing a breathing pattern, everything else seems to be fine.

Q Did you disagree with him?

A I -- no, I didn't.

Q Did you tell him you didn't believe that's what she was doing?

A No, I didn't.

Q What did he do in terms of checking her?

A The same as before.

Q What?

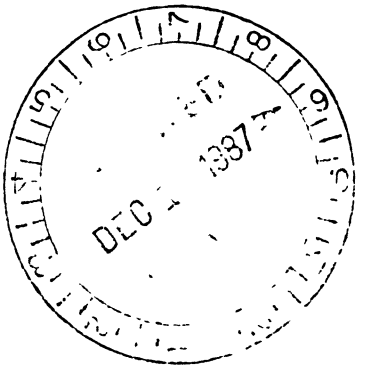
A Checked her eyes, checked her reflexes, checked her breathing, pushed on her belly, checked her private areas.

Q What was her breathing like there in the hospital?

A I wasn't a doctor. I didn't take and see what she was breathing, but she was breathing.

A D D E N D U M E

R. Scott Williams, #3498
STRONG & HANNI
Attorneys for Defendant Okubo
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080



IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---------ooo0ooo---------

ALBERT JOHN AND ANGELA BUTTERFIELD, as guardians and parents of and on behalf of TIFFANY RUTH BUTTERFIELD,	:	DEFENDANT OKUBO'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Plaintiffs,	:	
-vs-	:	Civil No. C86-9250
DAVID OKUBO, THOMAS NICHOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5,	:	Judge Richard Moffatt
Defendants.	:	

---------ooo0ooo---------

Defendant Dr. David Okubo, by and through counsel, hereby submits the following memorandum in support of his Motion for Summary Judgment.

STATEMENT OF FACTS

1. The plaintiff, Tiffany Ruth Butterfield, was born on June 30, 1984, as a daughter of plaintiffs Albert John and Angela Butterfield. Dr. Okubo visited and examined the infant plaintiff as part of the routine pediatric assessment

while at the hospital within the first few days after birth. This initial examination revealed that the infant plaintiff was in all respects healthy and otherwise normal.

2. On July 4, 1984, the infant plaintiff was taken to the Holy Cross Jordan Valley Hospital Emergency Clinic and was seen and examined by Dr. Thomas Nickol. The emergency chart for that particular visit indicates a history of decreased activity plus congestion in the nose that was improved with bulb suctioning. Dr. Nickol assessed the child as completely normal and instructed the parents to follow up with Dr. Okubo in the morning or sooner for increased symptoms. Plaintiffs, Mr. and Mrs. Butterfield have testified in their depositions that the infant plaintiff had short periods where she was not breathing that evening of July 4, 1984, that she had become listless and limp until stimulation would arouse her. Mr. and Mrs. Butterfield also testified that by the time they arrived at the emergency room the infant was breathing normally.

3. Mrs. Angela Butterfield has testified that she contacted Dr. David Okubo on the morning of July 5, 1984, but there is no record of a telephone call and Dr. Okubo does not have a memory of said call being made.

4. On July 16, 1984, Mrs. Angela Butterfield brought the infant plaintiff, Tiffany Butterfield, to defendant

Dr. David Okubo for a pre-arranged medical visit. Dr. Okubo obtained a history from Mrs. Butterfield on that occasion and examined the child. Dr. Okubo's office notes indicate that there was some history of "gasps" without any color change or reflux and that the infant's temperament was active and demanding. Dr. Okubo identified that the infant had good growth and development and that there was a normal physical examination.

Mrs. Butterfield has testified that she told Dr. Okubo during the visit of July 16, 1984, that the infant did have some short periods where she stopped breathing and had to be physically stimulated or aroused during the night of July 4, 1984, when they took her to Jordan Valley Hospital.

5. Following the visit of July 16, 1984, Mrs. Butterfield elected not to pursue any additional child care with Dr. David Okubo and consequently Dr. Okubo did not see the infant plaintiff at any subsequent time.

6. The infant plaintiff was seen at Holy Cross Jordan Valley Hospital again on August 16, 1984, by Dr. Thomas Nickol who reported that the mother was concerned regarding an irregular breathing pattern with four seconds of no breathing and without blue discoloration. Dr. Nickol assessed the child as a normal infant for her age and suggested to the parents that they monitor the child for increased respiratory

distress with cyanosis or blue discoloration. Even though Dr. Nickol suggested a follow up with Dr. Okubo for the two month check up, Mrs. Butterfield has testified that she had essentially terminated the physician/patient relationship with Dr. Okubo at this time.

7. Although plaintiffs have testified that there were much more serious symptoms that occurred on August 16, 1984, than were reported by Dr. Nickol, it is undisputed that this was not reported to Dr. Okubo at any time.

8. The infant plaintiff's care was transferred to Dr. Monty McClellan as of August 31, 1984, and Dr. McClellan saw the infant plaintiff on August 31, September 27, November 5, November 30 and December 14, 1984, for various symptoms or problems totally unrelated to the breathing problems that were allegedly reported to the other physicians. Dr. McClellan has testified that the plaintiff parents did not at any time report any problems with breathing or blue discoloration or the need to stimulate the child.

9. The infant plaintiff died from sudden infant death syndrome on December 20, 1984.

ARGUMENT

PLAINTIFFS HAVE NOT OBTAINED A PEDIATRICIAN OR ANY OTHER PHYSICIAN AS AN EXPERT WITNESS THAT CAN OR WILL TESTIFY THAT DR. OKUBO DEVIATED FROM THE STANDARD OF CARE.

PATIENT'S NAME Tiffany Butterfield BIRTHDATE 6-30-84 AGE ___ SEX Female

YOUR RELATIONSHIP TO THE PATIENT Mother TODAY'S DATE 7-16-84

PERINATAL HISTORY

birth weight 7 lbs length 18½ inches name of hospital Holy Cross Jordan Valley

Did the mother have any illness or other complication during pregnancy, labor, or delivery? yeast infection ---------- no (yes)

Was she taking any medication during pregnancy? No ---------- (no) yes

Did she receive regular medical care during pregnancy? ---------- no (yes)

Has she had any miscarriages, abortions, still births, or Cesaerean births? ---------- (no) yes

Have any of her children been born more than 2 weeks early or late? ---------- (no) yes

Have any of her children been born weighing more than 10 lbs. or less than 5? ---------- (no) yes

Was the birth of this child by a normal, vaginal delivery? ---------- (yes) no

Were there any problems with this child at birth or in the first month of life? ---------- (no) yes

NUTRITIONAL HISTORY

As an infant: breast fed ___ if bottle fed, type of formula Similac

age weaned ___ age that foods besides milk were started ___

Are there (or were there) infant feeding problems that you regard as excessive? ---------- (no) yes

Is this child taking vitamins? ---------- yes no

-fluoride? ---------- yes no

-iron supplement? ---------- no yes

Does this child drink more than a quart of milk a day? ---------- no yes

If this child is beyond infancy, does she or he usually eat 3 meals a day? ---------- yes no

Are there questions or concerns about nutrition you would like to discuss? ---------- no (yes)

DEVELOPMENTAL HISTORY

If a milestone mentioned below has not been reached, or if you are unable to recall approximately when it was reached, please leave the space for answering blank.

At what age did this child:

-sit without support for a few seconds without rolling over? ___

-begin to creep on hands and knees? ___

-begin to say words meaning something? ___

-walk without any help at all? ___

-put 2 or 3 words together with meaning? ___

-stay usually dry at night (toilet trained)? ___

At what age did this child's first tooth come in? ___

Which hand does this child prefer to use?: right ___ left ___ undetermined ___

If this child is of school age: name of school ___

grade ___ teacher's name ___

Has this child ever repeated a grade? ---------- no yes

Is this child having problems in school that worry you or the teacher? ---------- no yes

If this child is a girl who is having menstrual periods:

age of onset ___ are they regular? ___ problems? ___

In your opinion, is this child growing and developing normally? ---------- yes no

PERSONAL HEALTH

How would you describe this child's general health? (please check one)
excellent __ good X fair __ poor __ -any chronic health problems? ---- no yes

Has this child ever had an allergy or a bad reaction to a medicine or immunization?- no yes

Is this child taking medication now? ---------- no yes

Has this child ever had a serious accident or other injury (such as a burn, broken bone, concussion, cut requiring stitches, poisoning, etc.)? ---------- no yes

Do you have syrup of ipecac at home? ---------- yes no

Has this child ever been hospitalized and/or undergone surgery? ---------- no yes

age	reason for hospitalization	name of hospital

Immunizations: (please indicate age when given, or date)

DPT	_____	_____	_____	_____
oral polio	_____	_____	_____	_____
measles	_____			
mumps	_____			
rubella	_____			
other	_____			

DPT and oral polio vaccines are usually given at 6 to 8 weeks, 4, 6, and 18 months, 4 to 6 yrs., with diptheria-tetanus boosters at about 5 yr. intervals thereafter through adolescence. Measles, mumps and rubella (German measles) vaccines used to be given at 1 yr. but are now given at 15 months.

Illnesses: (please indicate if this child has had any of the following)
whooping cough __ measles __ mumps __ rubella __ chickenpox __
scarlet fever __ rheumatic fever __ croup __ bronchiolitis __
pneumonia __ hay fever or asthma __ exzema __ other __

Behavior: (please indicate if you have questions or concerns about any of the following) temper __ breath holding __ refusing to mind __ jealousy __ rocking back and forth __ head banging __ sleep disturbances __ toilet training __ bed wetting __ soiling __ eating dirt, plaster, etc. __ masterbating __ thumb sucking __ nail biting __ tics __ nervousness __ school performance __ lack of friends __ drugs, alcohol, smoking, etc. __ sexual behavior __ birth control __ other __

Review of Systems: (please indicate if any of the following apply to this child, where age-appropriate) trouble with appetite __ trouble with weight __ unexplained fevers __ trouble speaking __ trouble hearing __ more than 3 ear infections in the last year __ ears cleaned with Q-tips or other objects __ trouble with teeth __ teeth not regularly brushed __ dentist not seen in past year (if child is over 3) __ trouble seeing __ ever worn corrective glasses __ frequent sore throats __ a persistant cough or runny nose __ wheezing or trouble breathing __ exposure to Tb, or a positive skin test for Tb __ ever found to have a heart murmur __ persistant vomiting __ trouble with constipation or diarrhea __ recurrent stomach aches __ trouble with urination __ ever had a kidney or bladder infection __ ever had a genital discharge __ abnormally easy bruising or bleeding __ ever been anemic __ persistantly swollen glands __ skin problems __ joint pain or swelling __ ever worn corrective splints or shoes __ troublesome headaches __ ever had a seizure (fit, convulsion), staring or fainting spell __ other concerns __

Are there aspects of this child's health or past medical history that have not been mentioned above? (if so, please explain)

Nothing else but by the mother due to the Iranian problems

NAME OF PATIENT [illegible] AGE 2wks LNTH OR HT 20in WT 2#1½oz (3214g) HEAD CIRC 35cm

IMPRESSIONS

Good Growth
Recurrent.

NORMAL - PHYSICAL EXAM

SUGGESTIONS

USE FORMULA
NO NEED TO
SUPPLEMENT.

1-3 TSP KARO
WITH 4oz WATER
FOR CONSTIPATION

JUICE IS NOT NECESSARY
THING.

PKU.

Hx

health GAPS No Color A ∴ Repeat.

skin

feeding vit ___ fluor ___ { Bottle 18oz/d. 2-3 oz q 3 hrs.

sleep ONLY. — Nites

elimination OK 2-3.

temperament Active, Demanding 1st Child Ever.

sight, hearing

family situation 5yo mo Twins

PE

NL Ax Br Cv Sp

T ___ P ___ R ___ BP ___

general

skin O

head normocephalic ___ font 3x3

eyes sclera ___ conj ___ PERRL ___ EOMs (R) Ptosis red reflexes ++

ears: Signs

nose

teeth

mouth, throat: OK

neck O (N)

chest, back Clear.

lungs

heart, fem pulses (N)

abd soft ✓ umbil ? LKKs masses (-)

hips ✓

genital ✓

extrem

neuro

CN 2-12

tone

reflexes

A D D E N D U M F

HOLY CROSS JORDAN VALLEY HOSPITAL

EMERGENCY DEPARTMENT
NURSING CARE RECORD

Name Tiffany Butterfield Age 2mo ER# 3022118 M/F F M.D. Okubo Date 8/16/84 Time 2345

Complaint Breathing Problems

Hx ø

Allergies NKA Meds ø Tet _____ D.O.B. 6-30-84

Time	BP ♂	BP ♀/♀	T	P ♂	P ♀/♀	R	Rhythm	Glasgow	Pupils
2345			99.4 R.		140	50 crying			

Mode of Arrival (Car) Amb Walk Other:

X-Ray _____

Lab ABG's Pt Ptt
Amylase SMAs
Bili SMAC-20
CE Strep Screen
CBC/diff TXC
Dex Stix UA C&S T
Etoh Other: WR
Preg Urine Serum

KG Monitor

O2: NC Mask Venturi Et Rate L/M % Bagged

Ortho Inj Ice Elevate Splint

Lacerations: Injected Prepped Dressed Repaired

V Acuity OD / OS / OU

Time	IV Sol'n	Amt.	Site	Meds Added	Time Dcd	Amt In

Time	Medication	Dose	Route/Site	Nurse

Output
Urine/Foley Fr Amt _____ Autotransfusion Amt _____ Other:
Emesis/NG Fr Amt. _____ EBL Amt _____

Procedures	time		time

Patient Care Notes (Brief) 2mo old ♀ brought to ER ∈ irreg. Breathing ∈ episodes of 4 sec. ∃ breathing, ø Cyanosis. Mother concerned that child has not had BM today.

Child. Awake & alert, crying - fontanel soft. at size. Color pink skin warm & dry to touch. Breath sound clear in all lobes. Abd. soft flat ∈ + Bowel sounds. + nasal congestion - Child rooting as though hungry.

Dr. Nichol to see Pt.

Pt discharged ∈ instructions per Dr. Nichol to FU ∈ Dr. Okubo for 2mo WCC or sooner if problems

Nursing Care Extension Record

Disposition Time 0040 Discharge

Valuables to Patient Family Security

Admit Room # _____ Dx _____

Family Yes ____ No ____

Person Providing Nursing Care P. Condie RN

00053

A D D E N D U M G

Q. I understand that you did see Tiffany Butterfield. You are referring to your office records now, I assume.

A. Yes, I am.

Q. Could you tell me when you first saw her?

A. I first saw her on August the 31st, 1984.

Q. When you saw her, did her mother give you any kind of history?

A. Normally you always take a history.

Q. Can you tell me, then, what history you were provided with at that time?

A. That she was a normal birth, seven pounds, eighteen and a half-inch baby, that had no difficulty with pregnancy, that the chief complaint at that time was she had a rash, or she had a whitish material on the inside of her mouth, and that was a thrush and that was treated.

Q. Did she mention at this time any apnea or problems with breathing?

A. No.

Q. Did she mention any problems at all besides the rash?

A. No.

Q. Did you then schedule just a routine follow up or did she call the next time she was to visit you?

A. I would have normally scheduled a follow up.

I don't recall whether I asked her to return specifically or whether that was her own idea, but I normally would have asked her to come back and then to start her immunization schedule.

Q Did she report on this first visit any complaint of listlessness?

A No.

Q In Tiffany?

A No.

Q Or congestion?

A No.

Q What were your impressions, if you can remember?

A Just that she was a healthy baby and she had oral thrush.

Q When you saw her the next time, can you tell us the date and what your findings were.

A It was 9-27-84. Basically it was the same thing, it was normal well baby examination. Her head, ears, nose, eyes and throat were within normal limits. Fontanel was normal, the tear ducts were open, the yeast infection, intraorally was recovering with the microstatin I had given her. Her chest was clear, normal sinus rhythm. No abdominal masses, umbilicus was healed. No hernia, no hip click. Feet were normal. DPT and oral polio were given that day and she was scheduled for return

at two months.

Q. At this time was it your understanding that you were this child's primary physician?

A. As far as I knew.

Q. Was it your understanding that she was seeing you exclusively or did you know whether she was seeing other physicians, or did you know either way?

A. I don't recall, honestly.

Q. Do you recall on this second office visit having any discussions regarding apnea, congestion?

A. She didn't relate that the child was having any difficulties like that.

Q. I won't go into the specific office visits. I also have a copy of your records but I did want to ask you a couple of questions about it.

Were you also seeing the mother at this time as a patient?

A. Yes, I believe I was.

Q. Do you recall seeing her in the emergency room during the same period of time?

A. It would have been about the same period of time but I don't have my records in front of me. I can't tell you exactly which date.

Q. You don't have the records for the mother?

A. Well, that wasn't what we were supposed to

talk about today. I thought it was just about Tiffany and so--

Q Those are the only records you have?

A I could get them but, I haven't reviewed them or anything like that so--

Q We will stick with Tiffany just to stay sequential then, and then we could talk about the mother more later.

A Okay.

Q So your understanding, then, you saw the child six times; is that correct?

A Actually I believe I saw the child--

Q Five. Excuse me.

A Five times.

Q Because the December 22nd visit was just with the mother?

A Yes, it was.

Q And during these five visits from August until December, did the mother mention anything to you about problems with breathing, or problems with congestion, or listlessness, discoloration, any of those things?

A Yes, on one occasion. I'm sorry. Two occasions. She told me on November the 5th that the child had been having some mucus in her nose and that was treated.

I thought she had a serous otitis media and when I saw her back on the 30th that had resolved.

I did see her again on the 14th of December and she related that the child had mucus in her upper respiratory tract. The previous treatment had been effective so I reinstituted it, and then I did not see her after that.

Q Could you tell me from your notes on the 14th what was the previous treatment? The Rondec?

A Rondec, DM.

Q And so you continued it because--

A It recurred.

Q It recurred. Because it had resolved it by the 30th?

A Yes.

Q And could you explain to me what SOM is again?

A Serous otitis media.

Q And what is that?

A That is where you have fluid behind the ear but it is not of an infectious nature.

Q And was the condition complained of on the 14th the same thing; SOM, or was it something different?

A No. That was what she had on that one occasion on the 5th of November and on the 14th of December that was not present.

Q And the complaint of the 14th was just--

A That the mucus was present in her nose.

A D D E N D U M H

INTERROGATORY NO. 26: Identify all exhibits which may be introduced at the trial in this case.

ANSWER: Exhibits have not been determined except for the medical records.

INTERROGATORY NO. 27: Identify each person who will or may be called as an expert witness at trial. And as to each state:

a. Present address and telephone number;

b. Medical or professional specialty or capacity;

c. Educational background including any degrees or certification obtained from any educational, honorary, or professional association;

d. The date the expert was first contacted;

e. The fee arrangement with each expert that has been contacted;

f. The date that the expert was first contacted concerning this case.

g. The date that expert was first contacted concerning this case;

h. The substance of expert's expected testimony;

i. Whether the expert examined the deceased, and if so, state:

1. The date of each such examination;

2. The identity of any persons present at each such examination;

3. The nature and extent of each such examination.

4. Whether any written report, tapes, or photographs were taken or prepared concerning the examinations.

j. Whether the expert has previously testified in any prior medical malpractice actions;

k. If so, state:

1. The caption or each such case in which testimony was given, including names of parties, court and court case numbers.

2. Nature and substance of testimony;

3. Name and addresses of the attorney who procured the testimony.

ANSWER:

a. Michael C. Pinell

b. A C.V. is attached as Exhibit "A."

c. A C.V. is attached as Exhibit "A."

d. August 10, 1987.

e. Expert witness fees have not yet been established.

f. August 10, 1987.

g. August 10, 1987.

h. The medical care rendered by Dr. Thomas Nickol on July 4, 1984, and August 16, 1984, was performed within the accepted standard of care required of physicians specializing in emergency medicine.

i. No.

A D D E N D U M I

GARY D. STOTT (A3130)
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant Dr. Thomas Nickol
CSB Tower, Suite 700
50 S. Main St.
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALBERT JOHN and ANGELA BUTTERFIELD, Plaintiffs, vs. DAVID OKUBO, M.D., et al., Defendants.	AFFIDAVIT OF MICHAEL C. PINELL, M.D. Civil No. C86-9250 Judge Richard Moffatt

STATE OF UTAH)
)ss.:
COUNTY OF Salt Lake)

Michael C. Pinell, M.D., being first duly sworn upon his oath, deposes and states as follows:

1. I am a physician duly licensed to practice medicine in the State of Utah, and am board certified with the American Board of Family Practice, Fellow American Academy of Family Practice, American Board of Emergency Medicine and Fellow American College of Emergency Physicians.

2. My education and training are outlined in my Curriculum Vitae, attached as Exhibit "A".

3. I have been involved in the practice of medicine as an emergency room physician in the State of Utah during the time in

question in the Complaint of Mr. and Mrs. John Butterfield. I am familiar with the standard of care required of adequately-trained emergency medicine physicians in Salt Lake City, State of Utah during that time.

4. The opinions set forth in this Affidavit are based on my review of the medical records of Tiffany Butterfield from:

a. Dr. Kenneth D. Hunter;

b. Dr. David Okubo;

c. Holy Cross Jordan Valley Hospital

1) Inpatient record dated 6/4/84 and,

2) Emergency room records dated 7/4/84 and 8/16/84;

d. The State Medical Examiner.

5. Based upon my review of the medical records listed above, and based on my expertise as an emergency medicine physician, it is my opinion that the medical care rendered by Dr. Thomas Nickol to Tiffany Butterfield on July 4, 1984 and August 16, 1984, was performed within the accepted standard of care required of physicians specializing in emergency medicine.

DATED this 24th day of September, 1987.

Michael C. Pinell MD
MICHAEL C. PINELL, M.D.

SUBSCRIBED AND SWORN TO before me this 24 day of September, 1987.

NOTARY PUBLIC
Residing at S.L.C. Utah

My Commission Expires:
7-1-88

BUTTERF2/ROSE

A D D E N D U M J

IN THE THIRD JUDICAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ALBERT JOHN AND ANGELA BUTTERFIELD, as guardians and parents of and on behalf of TIFFANY RUTH BUTTERFIELD,	:	AFFIDAVIT OF H. BARRY JACOBS, M.D.
Plaintiffs,	:	
-vs-	:	Civil No. C86-9250
DAVID OKUBO, THOMAS NICHOL, and HOLY CROSS JORDAN VALLEY HOSPITAL, JOHN DOES 1-5,	:	Judge Richard Moffatt
Defendants.	:	

STATE OF UTAH)
: ss.
County of Salt Lake)

H. Barry Jacobs, M.D., being first duly sworn on oath deposes and states:

1. I am a physician licensed in the State of Maryland and am a Board Certified Surgeon since 1974. I have past experience in Emergency Room care at four hospitals, and Pediatrics, having cared for patients in private practice and hospitals, including the Children's Hospital in Washington, D.C.

2. I have reviewed the emergency room and pediatric records of the Decedent, Tiffiany R. Butterfield, as well as the depositions of her Parents, Albert and Angela Butterfield, and have met with Albert Butterfield.

3. I am familiar with the Standard of Care, applicable in 1984, required in pediatrics and emergency room medicine, as well as hospital responsibility for adequate record keeping and availability of previous records during later follow up care for a related complaint.

4. After a thorough review of the available data I am of the opinion that care below an acceptable standard was provided to Tiffany Butterfield by Dr. Nichol, Dr. Okubo, and the Holy Cross Jordan Valley Hospial with the specifics related below.

5. Assuming the facts as related in the parent's depositions to be true, the history of present illness and/or chief complaints gathered by the hospital nursing staff and Dr. Nichols on 07/04/84 fail to detail the fact that actual apnea was observed by the parents and there was cyanosis. Also omitted was the fact that the child required stimulation such as pinching or shaking before respiration was resumed. Given the lack of significant findings on exam to account for respiratory compromise and/or the apparent concern and anxiety of the parents, such an omission contributed directly to the failure to consider SIDS in a differential diagnosis.

6. When the child was taken as directed for pediatric evaluation on 07/16/84 by Dr. Okubo a vague reference was made concerning the fact that the child did have unexplained respiratory problems. Once again, an inadequate history lead to an incomplete assessment and second failure to consider the need to rule out SIDS as an etiological possibility.

7. The second emergency room visit of 08/16/84 did contain a somewhat unclear reference to periods of apnea not associated with cyanosis. This is refuted by the parent's deposition in that the child had been observed to have cyanosis with the apnea and once again required stimulation while being transported to the hospital that did resolve the cynosis.

8. It is alleged that the prior emergency room record of 07/04/84 could not be obtained. Such data should have been available. This would have reinforced the fact that unexplained respiratory problems existed and a differential diagnosis including SIDS should have been developed.

9. The physical exam as recorded by Dr. Nichols on 08/16/84 failed to note any cardiac findings. The discharge instructions did imply some need for monitoring the infant and that the child should be re-evaluated by the Pediatrician. The child's parents insist they did not receive any follow-up recommendations and therefore were unaware of the need for same.

10. There are no records available to detail what was recorded during a third emergency room visit on or about 10/01/84. The parent's deposition indicates the child again had an apneic episode and required stimulation. The deposition goes on to insist that a concern about SIDS was raised and discounted by Dr. Nichols as a possibility even though no other etiology had surfaced to explain the child's problems or account for the degree of parental concern and/or anxiety.

11. On 12/19/84 Tiffany Butterfield did indeed die from SIDS. This would easily have been avoided to a reasonable degree of medical certainty by either in-hospital observation and monitoring for apnea followed by the issuance of a home apnea monitor, or simply arranging for a home apnea monitor.

12. While one could perhaps argue that such care was not warrented following the 07/04/84 emergency visit, I am of the opinion that such care was justified after the 07/16/84 pediatric check-up and/or the 08/16/84 and 10/01/84 emergency room visits. Drs. Okubo and Nichols and a duty to insure necessary follow-up was carried out and failed to do so.

13. The above, in my opinion, constitutes care below an accepted standard (negligence) and was the proximate cause of the child's demise from SIDS.

Further affiant saith naught.

DATED this 21 day of December, 1987.

H. Barry Jacobs, M.D.

Subscribed and sworn to before me this 21st day of December, 1987.

Notary Public - Residing at:
Faye Arasim
Reston, VA

My Commission Expires:

My Commission Expires May 18, 1989